Order

Michigan Supreme Court
Lansing, Michigan

January 31, 2005

Clifford W. Taylor
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Justices

127292

In re B.M.B., G.P.B., minors.

FAMILY INDEPENDENCE AGENCY,
Petitioner-Appellant,

v

SC: 127292
COA: 252617
St. Clair Family Division:
03-000225

LAFRAYE BANKS,
Respondent-Appellee.

On January 13, 2005, the Court heard oral argument on the application for leave to appeal the September 30, 2004 judgment of the Court of Appeals. On order of the Court, the application for leave to appeal is again considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we REMAND this case to the St. Clair Circuit Court Family Division to determine, for each of the two children, whether "there is a reasonable likelihood that the child will suffer from injury or abuse in the foreseeable future if placed in [respondent]'s home." MCL 712A.19b(3)(b)(i). The St. Clair Circuit Court Family Division may conduct additional proceedings or evidentiary hearings, if necessary, and shall expedite its consideration of this matter.

We retain jurisdiction.

Justices CAVANAGH and CORRIGAN concur, Chief Justice TAYLOR joins the statement of Justice CAVANAGH, and Justice KELLY dissents, in statements set forth below:

CAVANAGH, J., concurs and states as follows:

This is an especially difficult termination case. I would prefer to defer to the determination made by the Court of Appeals and deny leave. However, I concur with the

remand inasmuch as it allows the trial court to again review this matter in accordance with the statutory criteria, take additional testimony if requested, consider the current circumstances, and clearly articulate the bases for whatever findings it makes. The "findings" and "conclusions" outlined in Justice Corrigan's concurrence are hers and hers alone and are not shared by me. As we are retaining jurisdiction in this matter, such determinations are better made by a review of the record following our remand.

TAYLOR, C.J., joins the statement of CAVANAGH, J.

CORRIGAN, J., concurs and states as follows:

I concur with this Court's decision to remand this case so that the St. Clair Circuit Court, Family Division, can articulate a separate conclusion regarding the reasonable likelihood that respondent's two children "will suffer from injury or abuse in the foreseeable future" if returned to her. MCL 712A.19b(3)(b)(i). I write to emphasize the following points.

MCL 712A.10(1)(c) provides that a referee may "*make . . . a recommendation* for the court's findings and disposition." (Emphasis added.) A referee's recommended findings are entitled to no deference by the circuit court. Here, the circuit court rejected the referee's recommendations and found that respondent intentionally (1) removed the window blinds, (2) pried off the seal around the screen, and, (3) threw her seven-month-old baby out a second-story window. On this basis, the circuit court held that respondent's children were "likely to suffer from injury or abuse in the foreseeable future" if returned to respondent. MCL 712A.19b(3)(b)(i). A reviewing court is required to affirm the circuit court's decision to terminate parental rights unless it is clearly erroneous. *In re Miller*, 433 Mich 331, 338 (1989); MCR 3.977(J).

While I do not believe the circuit court clearly erred in this case, I believe its legal conclusions are incomplete. The court properly rejected the referee's conclusion that the baby's two-story "fall" was directly related to the respondent mother's mental illness because respondent's attorney *specifically argued the contrary* during closing argument:

> I'm really not thinking, from my view of the testimony, *that there was any connection* between her illness and what I would firmly believe is the accident with respect to the child. [Emphasis added.]

Ample record evidence supported the circuit court's conclusion that respondent intentionally threw her child out the second-story window. Specifically, the child landed approximately twenty-two inches away from the home. This supports the theory that the

child was thrown from the window and not dropped, as respondent insisted. Moreover, respondent stated that when she used the sink to wash her hands before the "accident," nothing impeded her access. When it was pointed out to her that a set of blinds lay across the sink, she opined that the wind must have blown the blinds down and to the left, depositing them directly across the sink. Respondent's "wind" theory is patently ridiculous.

While the circuit court properly concluded that respondent acted intentionally when she threw her child out the second-story window, the court's opinion did not grapple with how respondent's intentional actions created "a reasonable likelihood that the child[ren] will suffer from injury or abuse in the foreseeable future if placed in [respondent]'s home." MCL 712A.19b(3)(b)(i). In my view, respondent's lack of candor under oath, as well as her refusal or inability to take responsibility for her intentional acts indicates that she is still in denial about the seriousness of her actions. Given her denial and her refusal to take responsibility, I believe respondent's children do face a reasonable likelihood of further harm if they are returned to her.

KELLY, J., dissents and states as follows:

I dissent from the majority's decision to remand this case to the circuit court for further proceedings. Because that court never articulated that a reasonable likelihood exists that the children will suffer from injury if returned to respondent, it failed in its effort to terminate under MCL 712A.19b(3)(b)(i). Therefore, the Court of Appeals correctly reversed the decision. I would deny leave to appeal.

If leave were denied and if respondent could not comply with her treatment plan, she would not regain her children, and the Family Independence Agency could again seek termination.

Because the case is being remanded for further action by the judge, I add that I do not share the "findings" and "conclusions" in Justice Corrigan's concurrence. I urge the judge on remand to make an independent and updated review of the merits of the question of future injury.

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SEAL OF THE MICHIGAN SUPREME COURT · LANSING ·

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 31, 2005

Deputy Clerk